No. 89-640

(12)

In the Supreme Court of the United States

OCTOBER TERM, 1989

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

NATIONAL WILDLIFE FEDERATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether, in a lawsuit challenging a vast array of government decisions affecting the use or disposition of approximately 180,000,000 acres of public land, an environmental organization may establish its standing to sue by relying on an affidavit asserting that one member of the organization makes use of property "in the vicinity of" a particular 2,000,000-acre parcel, only 4,500 acres of which were affected by one of the challenged decisions.

2. Whether the district court properly entered summary judgment against the respondent for its failure to make a timely showing of its standing to sue.

PARTIES TO THE PROCEEDING

The petitioners are Manuel Lujan, Jr., in his official capacity as Secretary of the Interior; Cy Jamison, Director of the Bureau of Land Management; and the Department of the Interior. The respondent is the National Wildlife Federation. In addition, the following parties intervened in the proceedings before the district court: Mountain States Legal Foundation; Rep. John Seiberling, succeeded by Rep. Bruce Vento, who intervened for the purpose of supporting respondent on Count II of the Complaint; and The Trust for Public Land, The Department of Water and Power in the City of Los Angeles, The County of Inyo, California, and The California Energy Company, Inc., each of which intervened for the purpose of obtaining an exemption from the preliminary injunction. Finally, ASARCO, Inc. sought intervention in the district court and, as a party to the proceedings before the court of appeals, appealed from the denial of intervention.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 878 F.2d 422. The opinion of the district court (Pet. App. 26a-37a) is reported at 699 F. Supp. 327. Prior opinions of the court of appeals (Pet. App. 38a-115a, 116a-118a) are reported, respectively, at 835 F.2d 305 and 844 F.2d 889, while prior opinions of the district court (Pet. App. 119a-136a, 137a-150a) are reported, respectively, at 676 F. Supp. 271 and 676 F. Supp. 280.

JURISDICTION

The judgment of the court of appeals (Pet. App. 151a-152a) was entered on June 20, 1989. On September 10, 1989, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including October 18, 1989, and the petition was filed on that day. It was

granted on January 16, 1990. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2 of the Constitution extends "[t]he judicial Power * * * to all Cases [and] * * * Controversies."

The Administrative Procedure Act, 5 U.S.C. 702, provides, in relevant part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

STATEMENT

Respondent National Wildlife Federation brought this action to challenge hundreds of executive branch decisions affecting approximately 180,000,000 acres of public land. In support of its standing to sue, respondent submitted an affidavit of Peggy Kay Peterson, one of its members. Peterson alleged an injury to her use of land "in the vicinity of" a 2,000,000-acre area known as Green Mountain/South Pass, Wyoming, arising from a decision by the Bureau of Land Management to terminate "Classification W-6228," which had shielded from mining activity some 4,455 acres scattered within the region. On the basis of the Peterson affidavit alone, the court of appeals found respondent to have standing to challenge not only the single decision from which Peterson's injury allegedly arose, but also hundreds of other decisions, affecting many millions of additional acres of public land.

A. The Bureau of Land Management's Review of "Withdrawals" and "Classifications" of Public Lands

1. *"Withdrawals" and "Classifications" of Public Lands*

For much of the Nation's history, federal lands policy was designed to dispose of public lands, not manage them. In the nineteenth century, for example, Congress enacted

homesteading laws allowing citizens to obtain title to federal land simply by living on it, 43 U.S.C. 161 *et seq.*, or to secure mineral rights simply by staking a claim and mining the land, Mining Law of 1872 (Act of May 10, 1872), 30 U.S.C. 22 *et seq.* Congress also granted large tracts to the railroads and to newly formed States. See, *e.g.*, "An Act to Aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean," Act of July 1, 1862, ch. 120, 12 Stat. 489 (July 1862), as amended, Act of July 2, 1864, ch. 216, 13 Stat. 356 (July 2, 1864); Wyoming Act of Admission, ch. 664, §§ 1-14, 26 Stat. 222-224 (July 10, 1890).

During those early years, the only way to reserve land from the operation of such disposal laws was to effect a "withdrawal." A "withdrawal" removes or segregates a specific tract of land from the public domain, and thus from the application of one or more disposal laws.[1] J.A. 140. Typically, the Department of the Interior "withdrew" particular parcels for specific uses—such as, for example, military bases, dams, or irrigation and agricultural projects. J.A. 140-141.

In 1934, Congress supplemented the Secretary's withdrawal authority by adding a second tool—"classification." The Taylor Grazing Act, ch. 865, 48 Stat. 1269 (as amended, 43 U.S.C. 315f), gave the Secretary broad authority to "classify" public lands as suitable for either disposal or federal retention and management.

Armed with both withdrawal and classification authority, President Roosevelt issued two executive orders (Exec. Order No. 6910, Nov. 26, 1934; Exec. Order No. 6964, Feb. 5, 1935), temporarily withdrawing all unreserved public land from disposal, until such time as those lands could be classified. *Andrus* v. *Utah*, 446 U.S.

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[1] Although withdrawals occurred at the President's order as early as the nineteenth century, the President first obtained specific congressional authority to withdraw lands in the Pickett Act of 1910 (Act of June 25, 1910), ch. 421, 36 Stat. 847, repealed by the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 704(a), 90 Stat. 2792.

500, 511-520 (1980). Pursuant to the Taylor Grazing Act, 43 U.S.C. 315f, and the 1964 Classification and Multiple Use Act, 43 U.S.C. 1411 *et seq.*, 78 Stat. 986 (expired 1970), the Secretary was thereafter required to review the public lands and determine which should be classified for retention in federal ownership, and which should be classified for disposal. By 1970, the Secretary had classified some 177,630,000 acres of public land for retention. J.A. 99. In addition, as a result of further congressional and executive action, withdrawals had removed many millions of additional acres from the operation of the public disposal laws and from multiple use management. Public Land Law Commission, *One Third of the Nation's Land* 53 (1970).

Overtime, however, the ad hoc, eclectic system of classifications and withdrawals proved unmanageable. By 1970, the Public Land Review Commission, appointed by Congress to study the matter, found that "virtually all" of the country's public domain had been withdrawn or classified for retention. The Commission "experienced great difficulty" in discerning "the extent of existing Executive withdrawals and the degree to which withdrawals overlap each other." *One Third of the Nation's Land*, *supra*, 52. It also discovered that federal agencies had not maintained "accurate records that show the purposes for which specific areas ha[d] been withdrawn," or the "uses that [could] be made of such areas under the public land laws." *Ibid.* The Commission therefore recommended a complete review of existing withdrawals and classifications—"a necessary step," the Commission declared, "to 'free' the public lands of encumbrances to effective land use planning for the future." *Id.* at 52-53.

2. *The Federal Land Policy and Management Act (FLPMA)*

In light of the Commission's recommendations, Congress, in 1976, enacted the Federal Land Policy and Management Act, 43 U.S.C. 1701 *et seq.* (FLPMA),

which embodied many of the Commission's objectives. FLPMA repealed most of the miscellaneous laws governing disposal of public land, Sections 1701 *et seq.* The Act also stated an explicit policy in favor of retaining public lands for multiple use management. The statute prescribed that management of public land was to be "on the basis of multiple use and sustained yield unless otherwise specified by law." [2] Section 102(a)(1), 43 U.S.C. 1701(a)(1). And to achieve its overall objectives, FLPMA required land use planning for all of the public lands.

Although FLPMA did not mandate a particular type of land use plan, it did identify nine criteria that land use plans should reflect. Section 202(c), 43 U.S.C. 1712(c), requires that planners (1) observe the principles of multiple use and sustained yield; (2) use an interdisciplinary approach; (3) give priority to the designation and protection of areas of critical environmental concern; (4)

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[2] Under FLPMA Section 103(c), 43 U.S.C. 1702(c),

> The term "multiple use" means the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific, and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.

Section 103(h) defines "sustained yield" as "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use." 43 U.S.C. 1702(h).

rely on the inventory of the public lands to the extent it is available; (5) consider present and potential uses of the public lands; (6) consider relative scarcity and alternatives to resource exhaustion (including recycling); (7) weigh long-term benefits against short-term benefits; (8) provide for compliance with applicable pollution control laws; and (9) coordinate land use inventory, management, and planning with the land use planning and management programs of other federal agencies, States, and local governments.

Those nine criteria, however, were not novel. Well before FLPMA was enacted, BLM had begun to effect multiple use management by developing Management Framework Plans (MFPs). By late 1969, the Bureau had developed detailed procedures for comprehensive land use planning through MFPs, and MFPs have continued to be used after FLPMA's enactment.[8] In 1979, BLM issued revised regulations calling for the development of a different type of plan, known as a Resource Management Plan (RMP). 43 C.F.R. 1610.8(a) (1988). Those regulations recognize the continued use of MFPs, and provide for the gradual phase-in of RMPs to replace the MFPs when appropriate. See, *e.g.*, 55 Fed. Reg. 4911 (Feb. 12, 1990).

In addition to prescribing the use of planning criteria, FLPMA confers upon the Secretary broad authority to manage the public lands--including the authority to review existing classifications and withdrawals. With respect to classifications, Section 202(d), 43 U.S.C. 1712(d), provides:

> Any classification of public lands or any land use plan in effect on October 21, 1976, is subject to review in the land use planning process conducted under this section, and all public lands, regardless of classification, are subject to inclusion in any land use plan developed pursuant to this section. The Secretary may modify or terminate any such classification consistent with such land use plans.

[8] In fact, FLPMA itself recognizes the existence of MFPs. Section 202(d), 43 U.S.C. 1712(d) (discussing land use plans "in effect on October 21, 1976").

In addition, Section 204(a), 43 U.S.C. 1714(a), authorizes the Secretary to "make, modify, extend or revoke" withdrawals. Pursuant to Section 204(*l*), 43 U.S.C. 1714(*l*), moreover, the Secretary is required to complete a review of all withdrawals of non-BLM administered federal lands in 11 Western States, and to report his findings to the President for transmission to Congress by 1991. Congress also directed the Secretary generally to review all withdrawals in those 11 States that *closed* federal lands managed by BLM and the United States Forest Service to appropriation under the Mining Law of 1872 (Act of May 10, 1872, ch. 152, 17 Stat. 91, as amended; 30 U.S.C. 22 *et seq.*) or to leasing under the Mineral Lands Leasing Act of 1920 (ch. 85, 41 Stat. 437, as amended; 30 U.S.C. 181 *et seq.*). Section 204(*l*)(1), 43 U.S.C. 1714(*l*)(1).

3. *Classification and withdrawal review*

a. The Department of the Interior had determined as early as the mid-1950's that some form of review of classifications and withdrawals was necessary. J.A. 141. Many withdrawals had become outdated, proposed projects had been abandoned, and in other cases the land character had changed. *Ibid.* In addition, many agencies for which a withdrawal had been made no longer needed it, or, in a few instances, the agency itself had ceased to exist. *Ibid.* And the enactment of FLPMA in 1976—with its broad delegation to the Secretary to review withdrawals and classifications—gave this review process an even higher priority in the agency.

The review process—particularly with respect to classifications (which affected by far the majority of the lands at issue in this case, see J.A. 164-165)—was detailed and complex, drawing on the technical skills of a wide range of planners and land-use experts. The Secretary examined each classification as part of a coordinated land use planning process, usually involving the development

of an MFP. In accordance with agency regulations, moreover, each MFP was accompanied by extensive public participation.[4]

b. The review of Classification W-6228—involving the land at issue in the Peterson affidavit—illustrates the process. At the outset, Classification W-6228 had segregated 2,077,702 acres of land in the Green Mountain/South Pass area from appropriation under agricultural land laws and from sales. J.A. 132. Of those approximately 2,000,000 acres, Classification W-6228 had segregated 6,379 acres from mining as well. *Ibid.* BLM began the process of preparing an MFP for the Green Mountain area in 1977 (J.A. 125); following a lengthy and complex process, resulting in a number of changes in the region's management, the agency terminated the classification against mining for about 4,500 acres in the region.

The first stage of the MFP involved preparation of a Unit Resource Analysis consisting of several parts: a base map indicating the boundaries of the planning unit and the status of each parcel of land within the unit; a detailed description of the geographic and environmental characteristics of the area, including analysis of all the natural resources within the area; analysis of the potential uses of each of the resources within the area; and an ecological profile to ascertain and describe any unique or fragile areas within the planning unit, to define the predominant land uses, and to identify all important management considerations.[5] J.A. 125-126. Next, BLM de-

[4] Withdrawal revocations, whether under Section 204(a) or Section 204(*l*) of FLPMA, are not subject to the land use planning process required by Section 202(c) for classification review. Compare 43 U.S.C. 1712(d) with 43 U.S.C. 1714(a). Post-FLPMA changes in withdrawal status were nonetheless effected in a manner consistent with existing land use plans and were subject to extensive public participation.

[5] The Unit Resource Analysis is contained in the record as Exhibit 1 to the Kelly Affidavit, which was attached to the federal defendant's Motion for Summary Judgment.

veloped resource objectives and recommendations. Each objective and planning recommendation was developed independently of the others, to ensure that the planners would be aware of the full potential of each resource.[6] J.A. 128. Finally, BLM performed a "planning area analysis," which provided an integrated account of the social, economic, resource, and environmental features of the area, and made tentative recommendations for resolution of any conflicts among the resource objectives and recommendations. J.A. 128-129, 133. The Green Mountain MFP was completed in 1981. J.A. 131.[7]

[6] That approach (known as "blinders-on") requires each resource specialist to make recommendations for use of the area as if no other resource existed. The wildlife specialist thus develops objectives and makes planning recommendations oriented solely to the maximum enhancement of wildlife habitat. The mineral and range management specialists do likewise for their respective resources. The purpose of the approach is to develop a set of proposals that reflect the optimum management possibility for each resource. The approach also ensures that when conflicts among resource objectives surface later in the planning process, the decisionmaker will be assured of having before him the full range of management options for each resource. And if no conflicts emerge, the approach ensures that resources can be managed at their optimum level. J.A. 128.

[7] At each of those stages, but particularly before the MFP became final, the public—at the federal, state, and local level—was informed about the process and invited to review the plans and proposals. In 1977 and 1978, while the Unit Resource Analysis was in preparation, BLM made approximately 80 contacts—ranging from telephone calls and personal interviews to group meetings and workshops—concerning the upcoming planning work for the area. J.A. 127. During each subsequent stage more contacts were made, including meetings with the Green Mountain Monitoring Group, ranchers, the Wyoming State Oil and Gas supervisors, and the Forest Service. J.A. 129. On July 30, 1979, BLM sent interested persons a letter enclosing a discussion and brief explanation of the MFP proposals. *Ibid.* At the public hearing held on August 22, 1979, a BLM official specifically discussed the proposed review of the areas segregated from mining by Classification W-6228. J.A. 129-130.

In late 1981, BLM proposed a series of land use decisions based on the MFP. J.A. 131. Among them was a decision to modify Classification W-6228. Like the review process overall, the modification of Classification W-6228 was the product of sustained, multi-factored analysis. At the "blinders-on" stage, see note 6, *supra*, the MFP had recommended that the mineral segregation established by Classification W-6228 be revoked entirely, because of the possibility of important gold and uranium deposits in the area. J.A. 133. A further, multiple-use analysis, however, disclosed that a wholesale termination of the existing classification would conflict with important recreational and historic uses of the land. J.A. 133-134. Accordingly, in September 1982, BLM decided to terminate the mineral segregation on approximately 5,120 of the 6,379 acres originally segregated by W-6228. J.A. 135. BLM retained the segregation on 959 acres in South Pass to protect wildlife values, on 120 acres in the Green Mountain area to protect significant recreational sites, on 80 acres in the Castle Gardens area to protect an important archaeological site, and on 100 acres in Beaver Rim to protect a proposed "Area of Critical Environmental Concern." *Ibid.* Pursuant to Section 202(d) of FLPMA, 43 U.S.C. 1712(d), BLM determined that those decisions were consistent with existing land use plans. J.A. 135-136.

Thereafter, the Wyoming State Game and Fish Department raised new concerns about a possible impact on moose habitat. In response, BLM revised its determination (J.A. 136-137), and elected to retain the segregation on an additional 768 acres. On May 10, 1984, BLM published in the *Federal Register* its final decision, terminating the mineral segregation as to 4,455 acres and retaining it on 1,913 acres. 49 Fed. Reg. 19,904-19,905.[8]

[8] BLM has continued to reevaluate those decisions in the context of ongoing land use planning. In January 1984, BLM initiated a Resource Management Plan for the entire Lander Resource area, encompassing Green Mountain and South Pass. 49 Fed. Reg. 3,277-3,278. In 1985, the agency prepared a draft RMP/environmental impact statement in which it discussed several options concerning the status of the area. J.A. 138. The Lander RMP—and all of the issues it raises—continue to be the subject of public meetings, hearings, and open houses. J.A. 138-139.

c. By 1986, BLM had terminated classifications on close to 160,000,000 acres. J.A. 164. Pursuant to Section 204(a) of FLPMA, moreover, BLM had also revoked withdrawals covering some 19,000,000 acres. J.A. 144.[9] Each of those approximately 1,250 orders was tailored to the unique circumstances of the particular land and other resources involved. For example, three classification orders on 1,418 acres in the State of Washington were terminated because the orders had classified the lands for sale under the Small Tract Act, which FLPMA had repealed. J.A. 167. At the other end of the scale, 25 classification orders on almost 23 million acres in Utah were revoked because the lands had been classified for "multiple use management and segregated from appropriation under the agricultural entry laws * * *" (J.A. 168); because FLPMA had repealed the agricultural entry laws and mandated multiple use management, those classifications had become moot. J.A. 169. BLM also revoked withdrawals that had segregated 1.7 million acres for the use of federal agencies that no longer needed the land. J.A. 142-143, 145. Those included relinquishments from the Coast Guard of 11 acres reserved for lighthouse purposes, as well as thousands of acres from the Army for lands no longer needed for weapons testing purposes. J.A. 146-148. And with respect to an additional 4.8 million acres, BLM revoked withdrawals for "record clearing" purposes.[10] J.A. 143-144, 145.

[9] BLM has undertaken all of its withdrawal revocations to date pursuant to Section 204(a) of FLPMA. No revocations pursuant to Section 204(*l*) of the Act have yet been completed.

[10] The "record" required "clearing" in three principal respects. First, some of the lands subject to withdrawal had previously been

B. The Present Controversy

1. a. On July 15, 1985, respondent National Wildlife Federation (hereinafter "respondent") filed the present action, charging that BLM had undertaken a massive program to lift "protective" restrictions on federal lands, in violation of the provisions of FLPMA, the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* Representative Seiberling (who has since retired from the House) intervened in support of respondent, and Mountain States Legal Foundation (MSLF) intervened in support of petitioners.

As subsequently amended, respondent's complaint alleged that the Federation and its members "are suffering and will continue to suffer injury in fact as a result of the challenged actions." J.A. 12. In particular, the complaint continued, the Federation's members "use and enjoy the environmental resources that will be adversely affected by the challenged actions." *Ibid.* The complaint did not, however, identify the "adversely affected" resources, other than by appending a list of 814 notices of "land status actions" published in the *Federal Register* between January 1, 1981 and the date of the complaint. J.A. 25-50. Even that list, the complaint asserted, was "not intended to be inclusive." J.A. 15.

With those allegations of standing as a predicate, respondent asserted three principal causes of action. First, respondent claimed that petitioners violated FLPMA by failing to prepare RMPs in connection with their classification terminations (covering about 160 million acres)

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transferred out of federal ownership. Second, there were numerous instances of overlapping withdrawals, which rendered one or more of the withdrawals unnecessary. Third, some of the withdrawals had been superseded by Congress; for example, Congress created a national park on an area covered by a withdrawal. In each of those cases, a revocation of the existing withdrawal was required in order to reconcile the public land records with the current status of the land. J.A. 143-144.

(Count I). Second, the complaint alleged that petitioners violated Section 204(*l*) of FLPMA when they revoked certain withdrawals (affecting about 20 million acres) in 11 western States without first submitting a review recommendation to the President or the Congress (Count II). Third, respondent asserted that petitioners violated FLPMA by failing to provide an opportunity for public participation in the "land use status" decisions (Count VII). J.A. 15-17, 20-21.

b. On December 4, 1985, the district court denied petitioners' motion to dismiss for failure to join indispensable parties and granted respondent's request for a preliminary injunction (Pet. App. 119a-136a). On a motion for reconsideration, the court also rejected MSLF's contention that respondent had not adequately alleged injury in fact from petitioners' actions (*id.* at 137a-150a). The court issued a nationwide preliminary injunction, enjoining the government from "[t]aking any action inconsistent with any withdrawal, classification, or other designation governing the protection of lands in the public domain that was in effect on January 1, 1981" (*id.* at 185a), thereby freezing the status quo as of that date for at least 180 million acres—an area equal to about one-thirteenth of the land mass of all fifty States.

The injunction had sweeping implications. In addition to halting more than 260 agricultural entries, the injunction froze hundreds of land transactions, including a land exchange between the Bureau and the State of Arizona under which the federal government would have obtained 500,000 acres of state land scattered throughout wilderness study areas and desert bighorn sheep and riparian wildlife habitat areas, in exchange for 150,000 acres of federal land (Martyak Affidavit at 6-7; C.A. App. 203-204); revocation of a land withdrawal that otherwise would have permitted the construction of a power-generation dam in the Grand Canyon Recreation Area (Bibles Affidavit and attached videotape); and

pending or proposed sales of BLM lands near Las Vegas, Nevada, to generate money to permit the Forest Service to purchase environmentally sensitive land in the Lake Tahoe Basin. See Collins Declaration at 1; C.A. App. 227.[11]

Because of the extraordinary scope of the preliminary injunction, the district court received numerous requests for exemptions during the next several months. The court soon found it necessary to modify the preliminary injunction, ruling, in an order of February 10, 1986, that the injunction did not directly enjoin the activities of third parties (although the practical effect of the revised injunction was to prohibit third-party activities on these lands in the many cases in which the transaction had not been completed). Pet. App. 145a. Thereafter, in response to federal legislation enacted to revise the court's injunction, the court approved additional amendments to its injunctive order. See, *e.g.*, Order of Nov. 25, 1986 (Pet. App. 169a); Order of Apr. 8, 1988 (Pet. App. 160a-161a); Act of Oct. 27, 1986, Pub. L. No. 99-542, § 3, 100 Stat. 3038-3039; Wild and Scenic Rivers Act, Amendments, Pub. L. No. 99-590, § 104, 100 Stat. 3332; Act of Nov. 7, 1986, Pub. L. No. 99-632, §§ 4, 6-7, 100 Stat. 3520, 3521; Act of Nov. 6, 1986, Pub. L. No. 99-606, § 12(h), 100 Stat. 3467; Federal Land Exchange Facilitation Act of 1988, Pub. L. No. 100-409, § 10, 102 Stat. 1092-1093.[12] Indeed, in one instance, respondent itself sought an exemption from the injunction for a land exchange that all viewed as environmentally beneficial. The court denied that request, without explanation (Order of Apr. 30, 1986, entered May 5, 1986 (Pet. App. 174a-175a)).[13]

[11] Congress specifically authorized these transactions in the Burton-Santini Act. Burton-Santini Act, Pub. L. No. 96-586, 94 Stat. 3381 (1980).

[12] On the other hand, when the Trust for Public Land—another environmental organization—sought to intervene in order to petition the district court to exempt from the injunction a land exchange that would have added 371 acres to various wilderness and forest lands, the district court granted intervention but refused to permit the exemption. Order of Mar. 6, 1986 (Pet. App. 176a-177a).

c. In May 1986, more than five months after the district court issued its injunction, respondent submitted three affidavits of members to support its standing to challenge the hundreds of land use orders affecting the approximately 180,000,000 acres of public land. The affidavit of Peggy Kay Peterson stated (Pet. App. 191a):

> My recreational use and aesthetic enjoyment of federal lands, particularly those in the vicinity of South Pass-Green Mountain, Wyoming have been and continue to be adversely affected in fact by the unlawful actions of the Bureau and the Department. In particular, the South Pass-Green Mountain area of Wyoming has been opened up to the staking of mining claims and oil and gas leasing, an action which threatens the aesthetic beauty and wildlife habitat potential of these lands.

The affidavit of Richard Loren Erman was virtually identical to the Peterson affidavit, except that it alleged that Erman uses land "in the vicinity of Grand Canyon National Park, the Arizona Strip (Kanab Plateau) and the Kaibab National Forest" (Pet. App. 187a). That

[13] Similarly, in August 1986, the Department of Water and Power for the City of Los Angeles, the California Energy Company, Inc., and the County of Inyo, California, sought to intervene in the action to seek exemptions from the preliminary injunction "for the limited purpose of obtaining a declaration that Cal Energy's geothermal operations on Naval Weapons Center lands * * * in the Coso Known Geothermal Resource Area, Inyo, California, are not within the scope of [the injunction]" or for an exemption for those operations. Motions to Intervene, Docket Nos. 188-190. The district court ultimately issued an order interpreting its injunction to exclude those operations, but denying a request to declare that a congressionally approved exchange of the land on which those operations are conducted is not within the scope of the injunction. Orders of Jan. 6, 1987, and Dec. 31, 1986 (Pet. App. 165a-168a).

area, called the Arizona Strip, contains 5.5 million acres, one-eighth of the State of Arizona. Erman claimed injury from potential uranium mining in that area allegedly made possible by Interior's action.

Finally, in support of its claim of "informational standing," respondent submitted a declaration of a vice-president of the organization, Lynn Greenwalt. The Greenwalt declaration alleged injury to the group's ability to acquire and disseminate information on the public lands. Pet. App. 193a-194a.

2. a. The government and MSLF appealed, and a panel of the court of appeals affirmed by a divided vote (Pet. App. 38a-115a). In upholding the preliminary injunction, the court concluded that respondent had "alleged injury in fact sufficient to establish standing to pursue its two FLPMA claims [Counts I and VII] against the Department." *Id.* at 56a. The court noted that respondent had alleged that its members regularly use the lands at issue (*id.* at 51a-52a), and it rejected the contention that those allegations were insufficiently specific. In any event, the court stated (*id.* at 53a-54a):

> Even if this lack of specificity were somehow fatal to the complaint, it was cured by the affidavits of two Federation members filed with the district court after issuance of the preliminary injunction. * * * These affidavits provide a concrete indication that the Federation's members use specific lands covered by the agency's Program and will be adversely affected by the agency's action. Mountain States contends that even these affidavits are insufficient because the named members claim only to use resources in the "vicinity" of the land covered by the challenged withdrawal revocations. The Federation's allegations in this regard however comport with those in [*United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973)]; they therefore are sufficiently specific for purposes of a motion to dismiss. [14]

Judge Williams concurred in the judgment on the standing issue, but wrote separately "in the hopes of clarifying what a plaintiff must show to meet the injury-in-fact component of standing when seeking a preliminary injunction" (Pet. App. 85a-86a). He stated that "NWF challenges the legality of two programs—classification terminations and withdrawal revocations—that affect over 180 million acres of public lands" (*id.* at 86a). He reasoned that standing principles require that respondent (*ibid.*):

> (1) identify lands that are affected by each program; (2) demonstrate that third parties are likely to respond to the regulatory changes with development activities; and (3) identify activities of members in specific areas that would suffer an adverse impact from such third-party conduct.

Judge Williams concluded that while respondent had adequately identified the land at issue, "[a]s to the other elements, NWF's submissions were markedly defective" (*id.* at 89a). In particular, he explained, the allegations in the complaint were "too vague," as were the assertions contained in respondent's affidavits (*ibid.*). He nevertheless concluded that the record "provides modest support for the inference that some types of the disputed regulatory status changes have a material likelihood of leading to development activity potentially injurious to the activities of plaintiff's members on the lands named in the affidavits" (*id.* at 90a).[15]

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[14] The court also held that respondent had not failed to join indispensable third parties or exhaust its administrative remedies, and that the complaint was not barred by laches. Pet. App. 57a-65a.

[15] Judge Williams dissented from the court's affirmance of the preliminary injunction, concluding that respondent was not likely to prevail on the merits, that it had failed to show a sufficient threat

b. The government and MSLF thereafter filed petitions for rehearing, and the panel denied the petitions in a per curiam memorandum. Pet. App. 116a-118a. In doing so, however, the court recognized that "some of the criticisms of the breadth and scope of the preliminary injunction offered in the vigorous dissent are not without force" (*id.* at 117a-118a). It also acknowledged that "the disposition of these millions of acres should not continue to rest any longer than necessary on the foundation of a preliminary injunction which was entered on consideration of the brief affidavits and cursory materials presented to the court below" (*id.* at 118a). The court therefore "issue[d] its mandate forthwith with directions to the parties and the district court to proceed with this litigation with dispatch" (*ibid.*).

3. a. In June 1986, prior to the court of appeals' decision remanding the case, the government had served 16 notices of deposition to discover the basis of respondent's allegations of standing. The following month, respondent filed a motion for summary judgment. It also moved, successfully, to preclude the government's request for discovery on the standing issue, asserting that any such discovery "would be unreasonably cumulative, duplicative, burdensome and expensive" (Motion to Quash and for a Protective Order at 7; Pet. App. 170a).

In support of a cross-motion for summary judgment, filed in September 1986, the government submitted extensive affidavits addressed to the question of standing. For its part, respondent continued to base its standing on the Peterson, Erman, and Greenwalt affidavits, filing no additional affidavits within the time allotted under Fed. R. Civ. P. 56. At the close of a hearing on the motion in July 1988, the district court requested supplemental briefing on the question of NWF's standing. In response to that request, respondent submitted not only a legal

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of irreparable harm, and that the potential threat of harm to other parties and to the public interest weighed against the issuance of an injunction. Pet. App. 99a-115a.

memorandum, but also four new factual affidavits. The district court refused to consider those affidavits, finding that they were "untimely and in violation of our Order" (Pet. App. 28a-29a n.3).

b. On November 4, 1988, the district court vacated the outstanding preliminary injunction, granted the government's motion for summary judgment, and dismissed the action for want of standing (Pet. App. 26a-37a). The court explained that to establish its standing, respondent was required to "plead and prove that it or its members have suffered some actual or threatened injury as the result of defendants' allegedly unlawful conduct" (*id.* at 31a). The court found that respondent had failed to meet that burden.[16]

The court first examined respondent's claim that the government had not permitted sufficient public participation in its review process. On that claim, the court noted, respondent based its standing on the Greenwalt declaration, which simply stated that the Federation's ability to meet its obligation to its members "has been significantly impaired by the failure of the Bureau of Land Management and the Department of the Interior to provide adequate information and public participation with respect to the Land Withdrawal Review Program" (Pet. App. 32a). The court found that statement "conclusory and completely devoid of specific facts" (*ibid.*), holding that it provided "no basis to support [respondent's] claim of standing" (*ibid.*).[17]

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[16] The court noted that the previous rulings concerning standing "arose in the posture of defendant's motion to dismiss, which affected the degree of factual specificity required to be shown in order to establish the likelihood of personal injury to plaintiff's members" (Pet. App. 29a). On a motion for summary judgment, it explained, a court is entitled to reconsider a preliminary determination of standing (*id.* at 30a).

[17] The court also noted that "[a]lthough not required to do so, because defendants did not have the burden to disprove plaintiff's conclusory contention, defendants have advised plaintiff of the environmental documentation and the methodology employed and have

The court turned next to respondent's claim of standing based on alleged environmental harm to its members resulting from the termination of classifications and the revocation of withdrawals. The court observed that respondent "rest[ed] its entire claim of standing to sue for environmental injury on the affidavits of two persons, *i.e.*, Peggy Peterson and Richard Erman" (Pet. App. 34a), which "use the same boiler plate language and format" (*id.* at 34a n.10). Peterson's affidavit, the court stated, simply "claims that she uses federal lands *in the vicinity* of the South Pass-Green Mountain area of Wyoming for recreational purposes and for aesthetic enjoyment" and that her enjoyment has been "adversely affected as the result of the decision of the BLM to open it to the staking of mining claims and oil and gas leasing" (*id.* at 34a-35a). Based on the government's affidavits, however, the court noted that 1,993,500 acres of the 2,000,000-acre South Pass-Green Mountain area (about 99.67%) had always been open to mining and mineral leasing and that petitioners' termination of the relevant classification opened up only an additional 4,500 acres (.225%) of that area. See *id.* at 35a. The court observed that Peterson's affidavit, which simply asserted that "she uses lands 'in the vicinity'" of the 2,000,000-acre area, failed to establish that her use "extend[ed] to the particular 4,500 acres affected by the termination" (*ibid.*).

The court concluded that the Erman affidavit was "similarly flawed." Pet. App. 35a. Erman, the court noted, asserted that he used federal lands "in the vicinity" of the Grand Canyon National Park and the Arizona Strip and that his enjoyment would be adversely affected by the BLM's actions, "with particular reference to the opening to the staking of mining claims" in that 5.5 million acre area, "an area one-eighth the size of the State of Arizona" (*id.* at 35a-36a). The government's

made its [*sic*] extensive files containing such information available for plaintiff's inspection" (Pet. App. 32a n.8).

affidavits showed, however, that "virtually the entire Strip is and for many years has been open to uranium and other metalliferous mining" (*id.* at 36a), and that the "revocation of withdrawal concerned only non-metalliferous mining in the western one-third of the Arizona Strip, an area possessing no potential for non-metalliferous mining" (*ibid.*). The court concluded (*id.* at 36a-37a):

> Both the Peterson and Erman Affidavits are vague, conclusory and lack factual specificity. They do not and cannot show "injury in fact" with respect to the two specific areas in Wyoming and Arizona in the vicinity of which these affiants claim to be located. More important, standing alone, these two affidavits do not provide any basis for standing to challenge, as violative of the Federal Land Policy Management Act, the legality of each of the 1250 or so individual classification terminations and withdrawal revocations. It should be noted that plaintiff's claims of injury reach hundreds of decisions affecting 180 million acres spread over seventeen states. Since plaintiff lacks standing in the constitutional sense or as an "aggrieved party" under Section 702 of the APA, we lack subject matter jurisdiction and dismiss for lack of standing. [18]

4. The court of appeals reversed (Pet. App. 1a-25a). The court first ruled that the Peterson affidavit, by itself, sufficiently established "injury-in-fact" to withstand summary judgment under the APA and the Constitution (*id.* at 15a-16a). The court acknowledged that the affidavit did not state that Peterson had used the 4,500 acres in South Pass-Green Mountain that were actually opened to mining and mineral leasing (*id.* at 16a-17a). It reasoned, however, that (*id.* at 17a):

[18] In light of its standing decision, the district court found it unnecessary to reach "the merits of plaintiff's claim for injunctive relief" (Pet. App. 37a). It noted, however, that Judge Williams' dissenting opinion "mirrored many of the[] problems in its discussion of our grant of preliminary injunction" (*ibid.*).

> The language of Peterson's affidavit can be read to *presume* that the 4500 newly opened acres included the areas that Peterson uses; otherwise her use and enjoyment would not be "adversely affected." * * * If Peterson was not referring to lands in this 4500-acre affected area, her allegation of impairment to her use and enjoyment would be meaningless, or perjurious. The District Court in no way questions the *veracity* or *clarity* of the affidavit, only its *specificity*. * * * But the trial court overlooks the fact that unless Peterson's language is read to refer to the lands affected by the Program, the affidavit is, at best, a meaningless document.

The court added that, "[a]t a minimum," the affidavit is ambiguous, and thus, on summary judgment, the district court should have resolved that ambiguity in favor of the non-moving party, in this case the respondent. *Ibid.*[19]

The court of appeals also held that the law of the case doctrine required a ruling on the standing question in respondent's favor. Pet. App. 18a-20a. The court noted that in affirming the preliminary injunction issued by the district court, a previous panel had rejected a challenge to respondent's standing. *Id.* at 18a-19a. The court reasoned that since "the burden of establishing irreparable harm to support a request for a *preliminary injunction* is, if anything, *at least as great* as the burden of resisting a *summary judgment motion*" (*id.* at 20a), the prior decision "upholding [respondent's] standing is therefore the law of the case, which disposes of this appeal" (*ibid.*).

Finally, the court found it "unfair and an abuse of discretion for the trial court to refuse to consider the affidavits submitted by NWF when the court asked for

[19] The court noted that since it found the Peterson affidavit sufficient to survive summary judgment, it did not need to address the sufficiency of the Greenwalt and Erman affidavits. Pet. App. 18a n.13.

supplemental memoranda on the standing issue" (Pet. App. 21a). The court surmised that "[n]o party to this litigation seriously disputes that NWF's supplemental affidavits, if considered, easily satisfy the level of specificity needed for standing under any of the Supreme Court's articulated tests" (*ibid.*). In a footnote, the court further held that, having established its standing to challenge one particular land action, respondent therefore had standing to challenge all of the hundreds of different land actions involved in the case. *Id.* at 16a n.12.

Having rejected petitioners' summary judgment challenge to respondent's standing, the court directed the trial court, on remand, to "address NWF's claims on the merits and fashion whatever relief it deems appropriate" (Pet. App. 24a). It "decline[d], however, to reinstate the preliminary injunction because the case should now proceed with dispatch" (*id.* at 25a).

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision of the court of appeals expands the standing doctrine beyond meaningful limitation. Departing from the already generous standards articulated in *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), and *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), the court below accepted a single, vague allegation—one member's use of land "in the vicinity of" a 2,000,000-acre area—as a sufficient basis for challenging hundreds of separate land use and disposition decisions affecting some 180,000,000 acres of public land. To do so, the court was constrained to "presume" that the affiant intended to assert an interest in the 4,500 affected acres scattered within the 2,000,000-acre area—although the affiant had never adverted to those lands, let alone asserted a personal interest in them.

The court's misapplication of standing principles would permit respondent, and similar plaintiffs in the future, to petition federal courts for far-reaching relief

from injuries that they have not shown any likelihood of suffering. The decision would thus threaten to draw the courts into disputes that lack "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult * * * questions." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). And once drawn so comprehensively into the fray, the courts would inevitably assume (as exemplified by the nationwide preliminary injunction here) managerial responsibilities for wide-ranging federal activities —activities whose administration properly belongs in the Executive Branch.

I. To secure standing to sue, a party must allege and, if challenged, prove that he has suffered a "distinct and palpable" injury as a result of the challenged governmental action. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979). That showing, moreover, "cannot be 'inferred argumentatively from averments in the pleadings,' * * * but rather 'must affirmatively appear in the record.'" *FW/PBS, Inc.* v. *City of Dallas*, 110 S. Ct. 596, 608 (1990). The Peterson affidavit satisfies neither those prerequisites. Peterson's allegation of injury, involving use of land "in the vicinity" of a 2,000,000-acre parcel, is too remote from the particular 4,500 scattered acres actually affected by the challenged land use action. Still more remote—indeed, non-existent—is any showing of Peterson's connection to the 178,000,000 remaining acres, outside the Green Mountain/South Pass region.

The court of appeals' effort to resuscitate Peterson's affidavit—by "presuming" that she had in mind the particular 4,500 affected acres—is fundamentally flawed. At bottom, the court's approach imputes to Peterson assertions that she did not, and perhaps could not, make on her own. The court of appeals had no warrant for presuming facts never proved. As this Court has recently reiterated, "it is the burden of the 'party who

seeks the exercise of jurisdiction in his favor' * * * 'clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.'" *FW/PBS, Inc.*, 110 S. Ct. at 608. And respondent was never required to prove, when challenged, the facts establishing its standing.

II. In granting summary judgment in this case, the district court resolved two other issues in the government's favor. First, the court refused to permit respondent to supplement the record by submitting new factual affidavits after the close of the summary judgment hearing (see Pet. App. 28a-29a n.3). Second, the court found that the Greenwalt affidavit, submitted in support of respondent's "informational standing" claim, was legally insufficient, in that it was "conclusory and completely devoid of specific facts" (*id.* at 32a). The district court resolved both issues correctly.

A. Although it had repeated opportunities over nearly two years to supplement the factual record, respondent rested steadfastly on the Peterson, Erman, and Greenwalt affidavits. Indeed, respondent resisted the government's effort to secure discovery on the standing issue, contending that further inquiry "would be unreasonably cumulative, duplicative, burdensome and expensive" (Motion to Quash and for a Protective Order at 7; Pet. App. 170a). Even after the government filed its summary judgment motion on standing grounds, respondent submitted no additional evidence to the court. Only after the conclusion of the hearing on summary judgment, when the district court asked for additional legal memoranda, did respondent change its tune. Along with the requested memorandum, respondent submitted new affidavits, but offered no excuse for the tardy submission. Under those circumstances, the trial court acted wholly within its discretion in rejecting the offerings.

B. The district court was also correct in finding the Greenwalt declaration legally insufficient. That declaration—submitted in support of respondent's "informa-

tional standing" claim—asserted simply that respondent's ability to pursue its programs had been "significantly impaired by the failure of the Bureau of Land Management and the Department of the Interior to provide adequate information and opportunities for public participation with respect to the Land Withdrawal Review Program" (Pet. App. 194a). The declaration did not identify particular information that respondent had been denied. Indeed, the declaration did not allege that respondent had even *sought* particular information, or had attempted without success to participate in the decision-making process that culminated in the challenged decisions. In the absence of such allegations, the Greenwalt declaration was insufficient to confer standing to sue.

In sum, having correctly concluded that respondent had wholly failed to establish its standing to sue, the district court properly granted summary judgment in favor of petitioners.

ARGUMENT

I. THE ALLEGATIONS CONTAINED IN THE PETERSON AFFIDAVIT ARE INSUFFICIENT TO CONFER STANDING ON RESPONDENT TO SUE

A. To Secure Standing To Sue, A Plaintiff Must Clearly Allege A Distinct and Palpable Injury Resulting From The Challenged Action

1. Article III of the Constitution limits the judicial power to "Cases [and] Controversies[.]" To establish standing under Article III, a plaintiff must allege a personal injury that is fairly traceable to the defendant's challenged conduct and that is likely to be redressed by the relief sought. *Allen* v. *Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). The injury cannot be an "abstract" or "hypothetical" one (*O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974); *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101-

102 (1983)); it must be "distinct and palpable" (*Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979)). And the claimed injury must ordinarily affect the party himself, not someone else: "the party who invokes the court's authority" must "show that he *personally* has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Valley Forge Christian College*, 454 U.S. at 472 (emphasis added). Only by identifying a concrete injury-in-fact can a plaintiff " 'allege[] such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth* v. *Seldin*, 422 U.S. 490, 498-499 (1975) (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)).

The Administrative Procedure Act, 5 U.S.C. 702, under which this suit was filed, complements Article III standing by limiting challenges to parties who are "adversely affected or aggrieved" by a governmental action. Under Section 702, the Court has required plaintiffs to show that they are personally injured and that their injury is caused by the challenged action. See, *e.g.*, *Valley Forge Christian College*, 454 U.S. at 472, 487-488 n.24; *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38-39 (1976); *Sierra Club* v. *Morton*, 405 U.S. 727, 732-733 & n.3 (1972).[20]

To be sure, the Court's decisions in *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), and *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), on which the court of appeals relied (Pet. App. 14a-15a, 17a), took a somewhat

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[20] Section 702 also requires plaintiffs to show that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388, 395-396 (1987) (quoting *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153 (1970)).

expansive view of standing. But in both cases the Court nonetheless insisted upon a clear showing of direct and personal injury. Thus, in *Sierra Club*, the Court held that the mere assertion that the Club had "a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country" was not enough to confer standing. 405 U.S. at 730. Because the Sierra Club had failed to allege any individualized interest in the specific lands in dispute, the Court rejected its standing claim. *Id.* at 734-735. Similarly, in the *SCRAP* case, in which the Court upheld the plaintiffs' standing, the Court emphasized that the plaintiffs had specifically claimed that their members "used the forests, streams, mountains, and other resources in the Washington metropolitan area" (412 U.S. at 685)—resources which, according to the allegations in the complaint, would be "directly harm[ed]" by the challenged government action (*id.* at 687). The Court explained that the plaintiffs had thereby "alleged a specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected" (*id.* at 689).

2. At the summary judgment stage of a litigation, a plaintiff may not rest on mere allegations, but must furnish sufficient proof of the injuries attributable to the defendant's actions. "For purposes of ruling on a motion to dismiss for want of standing," the Court has explained, "both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975). Accord *Pennell* v. *City of San Jose*, 485 U.S. 1, 7 (1988). Thereafter, however, the party invoking the court's jurisdiction may be required to furnish "by affidavits, further particularized allegations of fact deemed supportive of [its] standing." *Warth*, 422 U.S. at 501. At that point, "the allegations must be true and capable of proof at trial." *SCRAP*, 412 U.S. at 689. And if, having supplemented its pleadings with affidavits and further proof, "the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed." *Warth*, 422 U.S. at 502.

It is not sufficient, therefore, for a party simply to *suggest* a distinct and palpable injury—it must, instead, demonstrate that injury *clearly*, and do so on the face of the record. "It is a long-settled principle that standing cannot be 'inferred argumentatively from averments in the pleadings,' * * * but rather 'must affirmatively appear in the record.'" *FW/PBS, Inc.* v. *City of Dallas*, 110 S. Ct. 596, 608 (1990). Accord *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 546 & n.8 (1986).

This Court's recent decision in *FW/PBS, Inc.*, illustrates the specificity with which a party must establish its standing to sue. Plaintiffs in that case sought to enjoin the enforcement of a city ordinance regulating the issuance of licenses to operate "sexually oriented businesses." One of the provisions at issue denied licenses to persons who had been convicted of two or more enumerated misdemeanors within a 24-month period; that disability lasted for five years from the date of the last conviction or from release from confinement, whichever was later. Among the plaintiffs was Bill Staten, who alleged in his affidavit that he had been convicted of three enumerated misdemeanors within a 24-month period. Staten failed, however, "to state when he had been convicted of the last misdemeanor or the date of release from confinement" (110 S. Ct. at 609). Accordingly, the Court explained, Staten "failed 'clearly to allege facts demonstrating that he is a proper party' to challenge the civil disability provisions." *Ibid.* Because "[n]o other petitioners ha[d] alleged facts to establish standing and the District Court [had] made no factual findings that could support standing" (*ibid.*), the Court held that petitioners could not challenge the civil disability provisions of the ordinance. The Court certainly did not "presume" that Staten's last conviction or release from confinement fell

within the last five years, simply because he had alleged standing to challenge the ordinance.

B. Under The Governing Standards, Respondent Cannot Predicate Standing To Sue On The Allegations Contained In The Peterson Affidavit

1. Respondent has not made a sufficient showing of standing in the present case. The single affidavit on which the court of appeals relied—the Peterson affidavit—stated only that a single member uses land "in the vicinity of" a 2,000,000-acre area. That area, which is nearly three times larger than the State of Rhode Island, contains, scattered within it, no more than 4,500 acres of land (.225% of the total) affected by the challenged land status actions in this case. Nothing in the Peterson affidavit suggests that the affiant has any connection with the affected lands—it states merely that she uses and enjoys land "in the vicinity of" the millions of acres that surround them. And "vicinity" could mean Fremont and Natrona Counties, Wyoming (generally the area embraced by Classification W-6228); or all of central Wyoming; or, for all we know, anywhere in "the West." In short, unlike the plaintiffs in *SCRAP*, respondent has not shown "a specific and perceptible harm that distinguishe[s] [it] from other citizens who ha[ve] not used the natural resources that were claimed to be affected" (412 U.S. at 689).

In granting summary judgment on the record before it, the district court correctly concluded that respondent's proof of standing was "vague, conclusory, and lack[ing] [in] factual specificity." Pet. App. 36a.[21] The court of appeals held otherwise only by "presum[ing]" language that the affidavit simply does not contain. In the court's

[21] See *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986) ("the plain language of Rule 56(c) mandates the entry of summary judgment * * * against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case").

view, "[t]he language of Peterson's affidavit can be read to *presume* that the 4500 newly opened acres included the areas that Peterson uses; otherwise, *her* use and enjoyment would not be 'adversely affected.'" *Id.* at 17a. But the court's reasoning is exactly backwards; it "presume[d]" the requisite showing of standing because, had it not done so, respondent's standing claim "would be meaningless, or perjurious" (*ibid.*).

The court's presumption—that a mere claim of standing necessarily implies a factual basis to support it—wholly nullifies the standing requirement. It is precisely because Peterson did *not* demonstrate any use of, or other interest in, the affected land that respondent lacks standing to challenge the government's actions. The court below had no warrant for imputing to the affiant statements that she did not—and perhaps could not—make on her own.

This Court's cases do not countenance the use of free-floating presumptions to do the work that parties have not done for themselves. To the contrary, as the Court explained most recently, the "facts supporting Article III jurisdiction must 'appea[r] affirmatively from the record.'" *FW/PBS, Inc.*, 110 S. Ct. at 608. The Court's decision in *Grace* v. *American Central Insurance Co.*, 109 U.S. 278 (1883), illustrates that point in a closely related setting. The defendant in *Grace*, having been sued on an insurance contract, removed the case to federal court. In its removal petition, the defendant alleged that plaintiffs resided and were doing business in New York; the record did not, however, expressly show whether plaintiffs were citizens of New York, and the Court therefore reversed the judgment for want of diversity jurisdiction. In doing so, the Court acknowledged that the defendant's removal petition had *asserted* "that there is, and was at the time when this action was brought, a controversy therein between citizens of different States." *Id.* at 284. But that assertion, the Court held, was nothing more than an "unauthorized conclusion of law which the petitioner

[drew] from the facts previously averred." *Ibid.* The Court refused to draw the same inference in the absence of an explicit showing. Because the jurisdiction of a federal court is limited, the Court explained, "the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears." *Id.* at 283. The requisite showing of jurisdiction, the Court stated, may not simply "be inferred argumentatively from averments in the pleadings." *Id.* at 284. Rather, the Court observed, "the averments should be positive." *Ibid.*[22]

The statements in the Peterson affidavit were anything but "positive." Like the defendant in *Grace*, Peterson *alleged* that she possessed a sufficient Article III interest, but she did not support that allegation with evidence "distinctly and positively averred in the pleadings" (109 U.S. at 284). The court of appeals was therefore left to "infer[]" Peterson's standing "argumentatively from averments in the pleadings" (*ibid.*). Unhappily, the court below embarked upon just that task—"presuming" the missing statements of fact, and thereby drawing the same "unauthorized conclusion of law" (*ibid.*) renounced by the Court in *Grace*.[23]

The federal courts are not commissioned to do that much work for the parties. Under Article III, "it is the burden of the 'party who seeks the exercise of jurisdiction in his favor' * * * clearly" to demonstrate "that he is a

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[22] Accord *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 546-547 (1986); *Thomas* v. *Board of Trustees*, 195 U.S. 207, 210 (1904); *Mansfield, C.&L.M. Ry.* v. *Swan*, 111 U.S. 379, 382 (1884).

[23] The court of appeals alternatively surmised that the Peterson affidavit was, at worst, ambiguous, thereby preventing entry of summary judgment. Pet. App. 17a. That conclusion was also wrong. Ambiguity, without more, is not grounds for resisting summary judgment. To the contrary, under Fed. R. Civ. P. 56(e), it is up to the non-moving party to "set forth specific facts showing there is a genuine issue for trial." See *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Respondent had ample opportunity prior to the hearing to meet that burden, but failed to do so.

proper party to invoke judicial resolution of the dispute." *FW/PBS, Inc.*, 110 S. Ct. at 608. Peterson did not carry that burden, and the court of appeals was not entitled to shoulder the burden for her.[24]

2. Having "presumed" Peterson's connection to the 2,000,000-acre parcel in Green Mountain/South Pass, the court of appeals then compounded its error, many times over. The court held (Pet. App. 16a n.12) that respondent has standing to challenge actions affecting not only the 2,000,000-acre parcel identified in the affidavit, but also the remaining 178,000,000 acres of public lands whose status is in dispute.

Traditional standing principles cannot accommodate that judgment. Peterson claimed only a remote connection to the 4,500 affected acres in the Green Mountain/South Pass region, and her affidavit provides nothing further to connect her (or the organization representing her)

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[24] Any number of this Court's cases could have been decided differently if the plaintiffs in those cases had had at their disposal the court of appeals' presumption. In *FW/PBS, Inc., supra*, for example, plaintiff Bill Staten asserted in his affidavit that because of his three misdemeanor convictions within a 24-month period, he had a "serious doubt that [he] would be able to obtain the requisite licenses" (7 Record, Staten Affidavit at 2). Following the approach of the court below, Staten could have argued that, because he had alleged a "serious doubt" about his licensing prospects, a court must "presume" that Staten's last conviction (or release from confinement) occurred within the last five years. A similar device might have availed the plaintiffs in *Warth* v. *Seldin, supra*, involving a challenge to local zoning practices that allegedly deprived the plaintiffs of affordable housing. With the benefit of the court of appeals' presumption, a court could have "presumed" from plaintiffs' basic allegation—that the zoning practices had excluded plaintiffs from the housing market (see 422 U.S. at 503-504 & nn.13, 14)—the very facts that this Court found to be missing from the pleadings: "facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease" a home (*id.* at 504). In short, taken to the limits of its logic, the court of appeals' "presumption" could transfigure established standing doctrine, root and branch.

to the remainder of the public land at issue. Indeed, a nexus is not even alleged, let alone substantiated. Accordingly, Peterson's stake in that remaining land "amounts only to a generalized grievance shared by a large number of citizens in a substantially equal measure." *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 80 (1978). And as the Court explained in *Ex parte Levitt*, 302 U.S. 633, 634 (1937), "[i]t is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action * * * it is not sufficient that he has merely a general interest common to all members of the public." Accord *Warth*, 422 U.S. at 499; *Schlesinger* v. *Reservists Committee To Stop The War*, 418 U.S. 208, 220 (1974).[25]

This extraordinarily far-reaching litigation—which has already produced a sweeping, nationwide preliminary injunction—has thus been premised on nothing more than a simple allegation of use of land "in the vicinity" of Green Mountain/South Pass. Indeed, as we have noted (*supra*, p. 11), the terminations and revocations at issue in this case vary considerably—including such disparate orders as a relinquishment from the Coast Guard of 11 acres previously reserved for lighthouse purposes, and the abandonment by the Army of thousands of acres that were no longer needed for weapons testing. The sharply different circumstances of the hundreds of separate orders challenged by respondent suggest that this case would not be appropriate for associational standing (particularly, standing to assert challenges on a blunderbuss, wholesale basis), even if the supporting affidavits from three of respondent's members were not otherwise deficient. See *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

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[25] The Peterson affidavit alleges no more "distinct and palpable" stake in the land outside Wyoming than was the stake alleged by the Sierra Club in Mineral King and Sequoia National Park. See *Sierra Club* v. *Morton*, 405 U.S. at 735.

On the basis of the modest claim contained in her affidavit, Peterson was "presumed" to use the 4,500 affected acres scattered within the 2,000,000 acres that make up the region. And with that toehold interest alone, Peterson was then permitted to challenge (through respondent) a broad category of governmental decisions affecting an additional 178,000,000 acres of land throughout the Nation. Even if not itself flawed, the court of appeals' initial presumption would not justify so far-reaching an exercise of judicial power. A federal court, in resolving a dispute properly before it, may, of course, articulate a ratio decidendi that would have precedential implications for similar disputes. But it must be content to allow a subsequent court, before which a similar dispute arises, to determine whether it finds that precedent persuasive. It is not consistent with the judicial role under Article III for the initial court to seek to pretermit the future resolution of similar disputes by expanding the standing of the parties before it to reach beyond the particular interests they have shown.[26] Cf. *United States* v. *Mendoza*, 464 U.S. 154 (1984) (nonparty to prior lawsuit may not use "offensive" collateral estoppel against the government).

In sum, neither the toehold interest itself, nor the expanded scope of the litigation based on that asserted toehold, was founded on an adequate showing of standing in this case.

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[26] In authorizing judicial review at the behest of a person "adversely affected or aggrieved by agency action," 5 U.S.C. 702, the Administrative Procedure Act introduces no departure from this fundamental principle. Under that provision, a person aggrieved by a particular governmental order affecting particular lands may challenge that order in court. The suit authorized by 5 U.S.C. 702 is directed to the final "agency action" itself (embodied in that order); that provision does not authorize a more general judicial supervision of the agency program or policy pursuant to which the particular order (the "agency action") was adopted.

C. The Court of Appeals' Misapplication Of Standing Principles Implicates Serious Separation-of-Powers Concerns

1. Standing requirements take on added significance when an exercise of judicial power would "affect[] relationships between coequal arms of the National Government," because "[r]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either" (*Valley Forge Christian College*, 454 U.S. at 473-474) (quoting *United States* v. *Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring)). Indeed, the standing requirements themselves arise out of a "single basic idea—the idea of separation of powers" (*Allen* v. *Wright*, 468 U.S. at 752)—in that they demarcate fundamental limits on the role of the federal courts in our tripartite system of government. Departures from the principles governing standing may, therefore, rupture those limits. "Relaxation of standing requirements is directly related to the expansion of judicial power" (*Richardson*, 418 U.S. at 188 (Powell, J., concurring)), and such relaxation may bring into court "generalized grievances more appropriately addressed in the representative branches" (*Allen*, 468 U.S. at 751).

2. The present case conspicuously illustrates the separation-of-powers concerns implicated by a basic misapplication of standing principles. Indeed, the very scope of the litigation reflects its lack of Article III moorings. Early on, the district court entered, and the court of appeals sustained, a preliminary injunction freezing—for nearly three years—the status of almost 180 million acres of public land. That acreage amounts to approximately 281,000 square miles, a size exceeding that of all the States on the eastern seaboard from North Carolina to Maine. In addition to halting more than 260 agricultural entries, the injunction froze hundreds of land sales and exchanges, including at least one transfer that even respondent acknowledged to be environmentally beneficial.

See pp. 14-15, *supra*. And in administering that massive injunction, the district court was required to assume the role of a nationwide land use czar—fielding an array of conflicting claims for exemptions, granting some, while rejecting others. See pp. 14-15 & nn.12, 13, *supra*.

But even without the injunction in place (for now), the litigation is overwhelming. If remanded for trial, the case will require the district court to review administrative records relating to the hundreds of individual land decisions challenged by respondent, and to determine in each instance whether the land use plan on which petitioners relied satisfied the prerequisites of FLPMA. Managing a litigation of such dimension aggregates expansive powers in the court, and withdraws them, correspondingly, from the executive officials charged by law with the day-to-day responsibility for administering the public lands. The result, in this case, is a lawsuit seeking judicial supervision of the Secretary's entire administration, throughout the Nation, of his duties under FLPMA.

Standing doctrines are designed to avoid such clashes between judicial and executive authority. Under our constitutional system, the judicial power may be invoked to resolve controversies between persons adversely affected by a particular governmental action and the officials who took that action, not to supervise public officials' general conduct of their duties. In this case, the failure of the district court (at first) and the court of appeals (throughout) to adhere to this basic precept of judicial power under Article III has led to "adjudication in a vacuum" (Pet. App. 105a)—a vacuum in which the court imposed massive injunctive relief, controlling a huge amount of public land and unrepresented third parties, without any showing of threat of injury-in-fact to respondent or any of its members. The court of appeals has now ordered this massive case to proceed to trial on the same flawed premise.[27]

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[27] Relying on "the same boiler plate language and format" (Pet. App. 34a n.10) as the Peterson affidavit, the affidavit submitted by

II. THE DISTRICT COURT CORRECTLY ENTERED SUMMARY JUDGMENT AGAINST RESPONDENT FOR LACK OF STANDING IN THIS CASE

In granting summary judgment in this case, the district court resolved two other issues in the government's favor. First, the court refused to permit respondent to supplement the record by submitting new factual affidavits after the close of the summary judgment hearing (see Pet. App. 28a-29a n.3). Second, the court found that the Greenwalt declaration, submitted in support of respondent's "informational standing" claim, was legally insufficient, in that it was "conclusory and completely devoid of specific facts" (*id.* at 32a). In reversing, the court of appeals held that the refusal to accept the supplemental affidavits was "unfair and an abuse of discretion" (*id.* at 21a). The court did not address the sufficiency of the Greenwalt declaration (see *id.* at 18a n.13). In our view, the trial court resolved both issues correctly.[28]

Richard Loren Erman (*id.* at 187a-189a) alleged a use of federal lands "in the vicinity" of the Grand Canyon National Park and the Arizona Strip (*id.* at 187a)—a 5.5 million-acre area, or about "one-eighth the size of the State of Arizona" (*id.* at 36a). Although the court of appeals did not reach the issue (see Pet. App. 18a n.13), the district court found the Erman allegations to be "vague, conclusory and lack[ing] [in] factual specificity" (*id.* at 36a). The district court therefore held that the Erman affidavit was insufficient for standing purposes. For the reasons stated in point I, *supra*, with respect to the Peterson affidavit, the district court was correct in finding the Erman affidavit similarly wanting.

[28] In reversing the order granting summary judgment, the court of appeals also held (Pet. App. 18a-20a) that the prior panel decision on the appeal from the entry of the preliminary injunction constituted the "law of the case" and therefore precluded reconsideration of respondent's standing. That holding, of course, does not affect this Court's decision, since a reviewing court obviously is not bound by the "law of the case" established by a lower court for purposes of its own further decision. Beyond that, the court of appeals' application of the "law of the case" doctrine is deeply flawed. First, a court is always free (indeed, where necessary, required) to examine its own jurisdiction, including a plaintiff's

A. The District Court Did Not Abuse Its Discretion In Refusing To Permit Respondents To File Supplemental Affidavits Addressed To The Question Of Standing

Subject to the dictates of Fed. R. Civ. P. 56, the trial courts have broad authority to manage summary judgment proceedings in pending litigation.[29] More particularly, the decision whether or not to permit a litigant to supplement the record in a summary judgment proceeding is committed to the trial court's discretion. "Absent an affirmative showing by the non-moving party of excusable neglect * * *, a court does not abuse its discretion in refusing to accept out-of-time affidavits." *Clinkscales* v. *Chevron U.S.A., Inc.*, 831 F.2d 1565, 1568 (11th Cir. 1987). See also *Farina* v. *Mission Investment Trust*, 615 F.2d 1068, 1076 (5th Cir. 1980); *Beaufort Concrete Co.* v. *Atlantic States Constr. Co.*, 352 F.2d 460, 462-463 (5th Cir. 1965), cert. denied, 384 U.S. 1004 (1966).

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standing to commence an action. See *FW/PBS, Inc.*, 110 S. Ct. at 607-608. Second, allegations of injury that may be sufficient to survive a motion to dismiss or to warrant a preliminary injunction may not be sufficient to withstand a motion for summary judgment —which will typically be made on a fuller record, developed after more extensive discovery. See *University of Texas* v. *Camenisch*, 451 U.S. 390, 395 (1981); *United States* v. *SCRAP*, 412 U.S. at 689. Indeed, notwithstanding the second panel's determination (Pet. App. 19a-20a), the first panel decision in this case recognized that very point, stating that the allegations in the affidavit were "sufficiently specific for *purposes of a motion to dismiss*" (*id.* at 54a (emphasis added)). Finally, the earlier panel decision, which was predicated on the same inadequate affidavits that were before the court of appeals the second time around, is itself mistaken for the same reasons we have explained above.

[29] See, *e.g.*, *Childers* v. *Joseph*, 842 F.2d 689, 693-694 n.3 (3d Cir. 1988); *Koplove* v. *Ford Motor Co.*, 795 F.2d 15, 18 (3d Cir. 1986); *Pasternak* v. *Lear Petroleum Exploration, Inc.*, 790 F.2d 828, 832-833 (10th Cir. 1986); *Anthony* v. *Baker*, 767 F.2d 657, 666-667 (10th Cir. 1985); *Clark Equipment Credit Corp.* v. *Martin Lumber Co.*, 731 F.2d 579, 581 (8th Cir. 1984).

Exercising that discretion in the present case, the district court rejected respondent's submission of the supplemental affidavits as untimely. Its decision was not an abuse of discretion. Despite repeated opportunities to offer new evidence, respondent steadfastly refused to supplement the record. Indeed, respondent had earlier resisted the government's effort to secure discovery on the standing issue, contending that further inquiry "would be unreasonably cumulative, duplicative, burdensome and expensive" (Motion to Quash and for a Protective Order at 7; Pet. App. 170a). Even after the government filed its summary judgment motion on standing grounds, respondent submitted no additional evidence to the court.

There is nothing "unfair" about respondent's predicament (see Pet. App. 21a). The government highlighted the insufficiency of the first three affidavits in a summary judgment motion devoted exclusively to standing. Respondent filed a response—but no new evidentiary materials—and thereafter let nearly two years go by. Only after the conclusion of the hearing on summary judgment, when the district court asked for additional legal memoranda, did respondent change its tune. Along with the requested memorandum, respondent submitted new affidavits, but offered no excuse for the tardy submission.

In these circumstances, the trial court acted entirely within its discretion in rejecting the offerings. The court of appeals' contrary conclusion should be reversed.[30]

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[30] The court of appeals stated that "[n]o party to this litigation seriously disputes that [respondent's] supplemental affidavits, if considered, easily satisfy the level of specificity needed for standing under any of the Supreme Court's articulated tests." Pet. App. 21a. In our appellate brief, however, we had explicitly disputed the sufficiency of the supplemental affidavits. See Gov't C.A. Br. 34. Thus, even if the court of appeals had been correct in concluding that the trial court abused its discretion in refusing to consider the supplemental affidavits, we should have been permitted, in a remand to the district court, to contest the sufficiency and bona fides of the affidavits.

B. The District Court Correctly Held That Respondent's Allegations Of "Informational Standing" Were Insufficient

Apart from claiming standing on behalf of its members, respondent also submitted a single declaration in support of the organization's standing in its own right, alleging injury to its ability to obtain and disseminate information crucial to the organization's mission. That declaration (Greenwalt Declaration, Pet. App. 193a-194a) described the organization's activities, and asserted that its ability to pursue its programs had been "significantly impaired by the failure of the Bureau of Land Management and the Department of the Interior to provide adequate information and opportunities for public participation with respect to the Land Withdrawal Review Program." *Id.* at 194a. The declaration provided no further details about the source or extent of respondent's injury.

It is well settled that an affidavit that "contains only conclusory allegations, not backed up by statements of fact, * * * cannot defeat a motion for summary judgment." *Shane* v. *Greyhound Lines, Inc.*, 868 F.2d 1057, 1061 (9th Cir. 1989). "Mere conclusory statements * * * do not take on dignity by placing them in affidavit form." *Sweats Fashions, Inc.* v. *Pannill Knitting Co.*, 833 F.2d 1560, 1564 (Fed. Cir. 1987). Applying those principles, the district court concluded that the Greenwalt declaration's "bare claim" of injury was "conclusory and completely devoid of specific facts." Pet. App. 32a. Noting that respondent had the burden to make a showing as to each essential element of its case, the district court held, under *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986), that respondent had failed to meet its burden to show that it had been deprived of any information.[31]

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[31] The court further noted that although petitioners had no "burden to disprove [respondent's] conclusory contention" on this issue, petitioners had nevertheless "advised [respondent] of the environmental documentations and the methodology employed," and had

That conclusion was plainly correct.[32] The assertions contained in the Greenwalt declaration were insufficient to establish any injury to respondent's ability to gather or disseminate information. Like the Peterson affidavit, Greenwalt's declaration required, but omitted, crucial links in its chain of assertions. Although the declaration claimed that the government had failed to provide sufficient information about the review of classifications and withdrawals, it did *not* allege that BLM had withheld any particular information from respondent, or that the agency had denied respondent an opportunity to participate in the decisionmaking process. Indeed, the record would not bear out any such allegations: *all* of the pertinent evidence shows that BLM made its land status determinations, and all of the information leading up to them, fully available to the public, and that the agency consistently invited public participation. If respondent somehow overlooked that information, it has no one but itself to blame; indeed, even when the "extensive files" (Pet. App. 32a n.8) concerning each of these decisions were made available to respondent during the course of the litigation, no representative from the organization ever looked at them. July 22, 1988 Motions Hearing Tr. 49-50.

It may be that respondent could have *proven* an injury to its ability to gather or disseminate information (although we doubt it). The fact remains, however, that respondent did not even *assert* that it had tried to obtain

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made their "extensive files containing such information available for [respondent's] inspection" (Pet. App. 32a n.8).

[32] Although the court of appeals did not address the sufficiency of the Greenwalt declaration, the issue was resolved by the district court and fully briefed on appeal by the parties. See *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 583-584 n.24 (1979). Particularly where, as here, the issue is jurisdictional and the "facts" underlying the jurisdictional dispute issue are uncontroverted, this Court may reach the issue. See *FW/PBS, Inc.* v. *City of Dallas*, 110 S. Ct. at 607-608.

information but was turned away, or that it had sought to participate in the decisionmaking process but was denied access. Having failed to make the requisite allegations, respondent lacks standing to assert an information-based claim.[33] See *Public Citizen* v. *United States Dep't of Justice*, 109 S. Ct. 2558, 2563 (1989) (plaintiffs had standing because they had "specifically requested, and been refused" particular information from an American Bar Association committee). See also *ibid.* (noting that in cases brought under the Freedom of Information Act, parties may secure standing by showing that "they sought and were denied specific agency records").

Accordingly, respondent wholly failed to establish its standing to sue, and the district court was therefore correct in awarding summary judgment against respondent.

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[33] While respondent's failure to substantiate its claim of injury is thus dispositive, we note further the lack of legal foundation for respondent's reliance on "informational standing" as a sufficient basis for asserting its broad and far-reaching legal contentions in this case. Even the Freedom of Information Act, 5 U.S.C. 552, which was enacted for the specific purpose of providing a right of access to government information, does not require the government, in response to information requests, to create documents that do not already exist. *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 152 (1980). Far less does that Act authorize lawsuits to interfere with the conduct of government activities while such documents are created, or while existing government documents are being compiled and disseminated. Similarly, lawsuits to restrain governmental action pending compliance with the requirements of environmental statutes, such as the procedural requirements of NEPA, have been founded on the plaintiff's showing of a requisite interest in the particular governmental action at issue—not merely a showing of the plaintiff's desire for information or its wish to be heard. See, *e.g.*, *SCRAP*, 412 U.S. 669.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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